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No. _____

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October Term, 1991

CHARLES FAIRCHILD,
RAY IMBAGLIAZZO,
RAUL RODRIGUEZ and
NELSON STATOM,
CERTAIN STEPHANS CLASS
IN PRO PER,

Petitioners,

vs.

PACIFIC MARITIME
ASSOCIATION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES DISTRICT COURT
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this court should issue a Writ of Certiorari because the Ninth Circuit, contrary to its own decisions and the decisions in other circuits, concluded that the District Court had subject matter jurisdiction to uphold an order to enforce under a Consent Decree despite the fact that the primary asserted basis of relief for the petitioner was under Section 503 of the Rehabilitation Act of 1973, which does not create or provide a private cause of action for such handicapped persons, and by so doing violated the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the Constitution.

II. Whether this court should issue a Writ of Certiorari because the Ninth Circuit erroneously concluded that the Federal District Court apparently had primary jurisdiction and the individual petitioners

were not required to exhaust the administrative remedy by filing a Complaint with the Department of Labor as mandated by Congress under the Federal Rehabilitation Act of 1973, and as a consequence has violated the petitioners' rights of due process and equal protection under the Fifth and Fourteenth Amendments to the Constitution.

III. Whether this court should issue a Writ of Certiorari because the Ninth Circuit should have required the District Court to not dismiss the Contempt proceeding because of the "No Signal" work exemption is blanket in its application and does not consider the individual physical impairment of the affected individual employee and makes no attempt for reasonable accommodations for that particular individual's physical disability or impairment in accordance with the guide lines of American Medical

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OFFICIAL REPORTS OF OPINIONS HEREIN:

The Opinion below does not appear in the Official Reports of the United States Court of Appeals because it was not certified for publication. Nor was the order denying the petition for rehearing.

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. Section 1254 and United States Supreme Court Rule 10.1(a)(c), this court has jurisdiction to consider this Petition for WRIT OF CERTIORARI to review the decision of the Court of Appeals for the Ninth Circuit. Jurisdiction in the District Court was based on 29 U.S.C. Section 793. The Ninth Circuit entered its memorandum order on July 15, 1991. (Appendix A.) A timely petition for rehearing to the Ninth Circuit was denied on October 24, 1991. (Appendix B.)

STATUTORY PROVISION AND POSSIBLE APPLICABILITY OF 29 U.S.C. Sec. 793

This case requires construction of 29 U.S.C. Section 793 to determine whether or not it creates a private cause of action on behalf of physically handicapped workers subject to federal contracts and affirmative action programs mandated by Congress and the rules and regulations promulgated by the Department of Labor pursuant to the congressional mandate.

STATEMENT OF THE CASE

The original Plaintiffs in this action filed a class action complaint on October 27, 1980 alleging that the Defendants had engaged in discriminatory employment practices against women in violation of Title VII of the Civil Rights Act 1964, as amended, 42 U.S.C. §2000e et seq. This group of persons is called the "Golden class." The Defendants in this action are the PACIFIC MARITIME

ASSOCIATION (hereinafter "PMA"), INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (hereinafter "ILWU"), Local 63 of the ILWU, herein referred to as "Local 63" or "Clerks Local" and Local 13 of th ILWU (sometimes hereinafter referred to as "Local 13" or "Longshore Local").

Defendant PMA is an employer association of, among other, the stevedore and companies of the Los Angeles - Long Beach port. The union Defendants are collective bargaining representatives for employees performing Clerk and longshore work for the PMA stevedore and shipping companies.

On May 18, 1981, a group of complainants intervened in the action contending that they represented a class of persons who claimed that the Defendants had violated certain rights of theirs under the collective bargaining agreement between PMA and the ILWU. This group of employees is the the

"Bower Class" and is composed of all male persons who were not registered as marine clerks who had been dispatched as casual employees to marine clerk jobs by the marine clerks dispatch hall.

The third group who intervened is the "Stephans Class." This class is composed of all persons who had been, or are qualified, or in the future would qualify, to be dispatched to extra clerks' work as "injured longshore workers'. The basis of their complaint was, among other things, contentions of violation of Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793(a). (Appendix F.)

Subsequently, the Court entered a Consent Decree on May 25, 1983. (Appendix E.)

A Memorandum Re Fairness of Settlement was likewise filed by the Court. (Appendix E.)

Prior to the entry of the Consent Decree, injured longshoremen, who could physically

only perform clerks' work by reason of their physical disability, paid dues to both Local 13 and Local 63. As a result, the injured longshoremen reported to the dispatch hall of Local 63. After the dispatch of all marine clerks, "clerk work" was then dispatched to the injured longshoremen. If excess marine clerk work was available, it was then transferred to Local 13 and dispatched under its dispatch procedure. At this time, injured longshoremen, who could only perform clerks' work, had an exemption from performing certain types of longshore work, which were considered light duty as compared to other longshore type jobs. This included what is called "front work" and "signal work". This was generally called "N.F.S." or "N.F.N.S.". This was understood to mean "no front, no signal" work. As a result, these injured longshoremen were not required to perform either front work or signal work.

Following the signing of the Consent Decree, the injured longshoremen referred to above were assigned back to Local 13 for dispatch.

Marine clerk work was dispatched through Local 63. it was first assigned to employees in marine clerk "A" category. The next order of priority were those persons in the "Golden" class and the "Bowers" class. Any excess marine clerk work was then assigned over to Local 13 for dispatch under its procedures. At Local 13 the work was first assigned to the dispatch board consisting of employees with the lowest average hours worked. It is called the Low Board. The Low Board would be comprised of members who had the lowest number of average hours within a given period of time. It is one of approximately 15 boards of various job categories. After exhausting the dispatch of members checked in on the Low Board, excess clerks work would then be

offered to the injured longshoremen, after exhausting any other lower boards. Under these dispatch procedures, the injured longshoremen, who had a "no front, no signal" exemption, would not be penalized by declining to perform those particular jobs by reason of their physical inability to do so and would still be available to perform marine clerk work if such work were otherwise available.

This procedure continued without change until June 15, 1987. Rather than make an application to the Court, as contemplated by ¶¶16, 30 and 34 of the Consent Decree, the Joint Port Labor Relations Committee, which has overall responsibility for the operation of the dispatch procedures at Local 13 and 63 aforesaid, determined that it would no longer recognize and honor the "no signal work" exemption previously afforded certain injured longshoremen, who had submitted medical evidence from their treating surgeon to support

a finding of physical impairment from performing such duties.

The Consent Decree recognized the existence of a "Casualty Board" at the dispatch hall in the Los Angeles - Long Beach port. Paragraph 43 clearly recognized that a procedure existed whereby injured longshoremen could be dispatched to extra marine clerks work if such an employee submitted a doctor's report or certificate setting forth the longshoreman's injuries or disabilities. Paragraph 44 of the Consent Decree attempted to provide a more equitable assignment of this extra marine clerks work for longshore workers that were either temporarily or permanently disabled. The extra marine clerk work was assigned to the Casualty board as were all "front jobs" as that term is known in the port. All persons desiring to receive "check-in" rights on the Casualty board were required to be examined by physician or

physicians chosen by the Joint Port Labor Relations Committee (hereinafter referred to as J.P.L.R.C.).

Paragraph 47 of the Consent Decree charged to the J.P.L.R.C. with the responsibility of considering whether an injured longshore person would be unable to perform certain work dispatch from the Casualty Board. It specifically provides as follows:

> ". . .If the Committee so determines, based upon the physician's report, it shall specify the types of work that the injured longshore person need not perform. If such a determination is made, it shall become a part of the certification of that longshore person to the Casualty Board and the person so certified may thereafter, so long as he or she remains so certified, refuse any such work offered that would be in contravention of the certification. Such refusal of work shall not be considered as grounds for denying benefits to an injured longshore person under the Pay Guarantee Plan or for any penalty whatsoever."

Each of the individual named - petitioners had been assigned a "no front,

no signal" exemption at the time the J.P.L.R.C. made the blanket determination to no longer recognize any and all "no signal work" exemption. The rights of petitioners herein were severely prejudiced because the blanket refusal to recognize this exemption did not properly consider the nature and extent of their physical impairment as to whether or not it precluded him from performing the duties of "signal work."

The implementation of the change in the rules and procedure with respect to the elimination of the "no signal work" exemption had its origins in exemption requests and the official J.P.L.R.C. meetings in February 1983. It should be noted that this was just several months after the signing of the Consent Decree and a few months after its entry by the Court.

At a J.P.L.R.C. Meeting of April 13, 1983, the Committee again met to discuss the Casualty Board as established in the Consent Decree, and in particular addressed its items to Paragraphs 43 through 47.

During the course of that early meeting, the union representatives recommended that certain job descriptions be established. These included front jobs, signal jobs, winch driver jobs and clerks' jobs. At that meeting, the Committee agreed that a longshoreman on the Casualty Board must accept front work and signal work jobs prior to accepting clerk work.

However, the implementation of this early determination was not done until it was "revitalized" in or about July 1986. By that time, the J.P.L.R.C. had selected Dr. Michael S. Wald to serve as the physician contemplated by Paragraph 45 of the Consent Decree. Dr. Wald was selected by

the J.P.L.R.C. in 1985.

In July 1986, the J.P.L.R.C. met to discuss the question relating to Casualty Board members claiming they cannot perform front work or signal work and by so doing, claiming that they could only perform marine clerks work. This is the category of the four named petitioners in Pro Per.

At that time, the Committee discussed the possibility of allowing an exemption on the Casualty Board from front work only.

It was at this meeting that the Committee further agreed to conduct another tour of the harbor for Dr. Wald so that he could observe the various jobs dispatched from the Casualty Board.

Once again, on February 18, 1987, the J.P.L.R.C. reached an agreement to meet with Dr. Wald concerning the possibility of requiring all individuals checking in on the Casualty Board to take signal work

and marine clerk work or take the 6 hour "flop" penalty. Following a discussion at this meeting, the Committee agreed to meet with Dr. Wald concering this issue.

Dr. Wald made two visits to the waterfront to observe various jobs under the guidance of the J.P.L.R.C. The first occurred in February 1987. The second tour of the waterfront area occurred on March 4, 1987. Following the tour with Dr. Wald on March 4, 1987, the J.P.L.R.C. representatives met immediately thereafter, and the Committee discussed the exemption request of injured longshoremen from performing signal work. The employer representatives took the position that the Consent Decree did not provide an exemption from signal work and that an individual could perform signal work if he could perform marine clerks work.

On or about May 27, 1987, a bulletin was circulated among employees in the harbor informing them of the intended decision of the J.P.L.R.C. to no longer grant the signal work exception. The J.P.L.R.C. met on June 1, 1987. At this meeting, the Committee agreed that the only exemption to be granted from the Casualty Board was front work. Exemptions from performing signal work would no longer be granted effective June 15, 1987.

This determination was made without any of the parties making an application to the Court to modify the terms of the Consent Decree entered on May 25, 1983.

It should be noted that the change in the rules and procedures was drastic. The exemption had been permitted before the Consent Decree and during the first four years of the implementation of the Consent Decree. An exemption from "signal work"

would be granted based upon the physical impairment of the injured longshoremen. The degree and extent of physical impairment was based upon the medical disability of that particular individual. The effect of the change in the rules and procedures was to no longer permit any exemption from the performance of signal work regardless of the physical impairment assigned by a physician. Instead, the effect of the rule change was to require every injured longshoreman to perform signal work irrespective and without consideration of that particular individual's physical impairment or physical disability. It was now mandatory for an injured longshoreman to accept a signal work assignment or else lose a work opportunity or be charged with "passing up a work opportunity." He now was ineligible for Pay Guarantee Plan. The "work opportunity" was not considered to be a "volunteer"

job, which could be rejected without penalty, as was the case with all other job categories on all other dispatch boards. As such, it was a discriminatory employment practice, which now permitted the employer to have the work assigned to outside, unregistered casual workers at approximately one-half the wage cost.

It was this unilateral implementation of a change in the rules and procedures without making application to Court for modification of the Consent Decree as contemplated by ¶¶'s 16, 30, and 34 thereof, that led to the filing of the motion in re contempt by these affected petitioners.

The evidentiary hearing before the Honorable Robert M. Takasugi took approximately six days. Following the submission of evidence, which consisted of declarations, direct testimony of witnesses, 77 photographs, a video and documentary

evidence, the Court issued its Findings of Fact and Conclusions of Law (Appendix D) and an Order dismissing the contempt proceedings on May 30, 1989. (Appendix C)

The injured longshoremen - petitioners herein filed an appeal on June 29, 1989.

The petitioners are injured longshoremen and members of the Stephans Class. The four individual petitioners are Charles Fairchild, Ray Imbagliazzo, Raul Rodriguez and Nelson Statom.

Charles Fairchild had been working in the harbor area as a casual employee since July 4, 1963. He continued to do so over the years. He obtained a sufficient number of hours of employment as a casual employee to reach longshoreman "B" status on January 20, 1982.

On June 15, 1982, Fairchild suffered an injury to his cervical spine and lumbar

spine when a 40 lb. box of bananas hit him on the head while a banana boat was being unloaded. This individual has pain throughout his cervical spine with radiation into his left shoulder and left arm with occasional numbness and twitching of the left hand. He also has constant pain throughout the lumbar spine with radiation into the left leg and foot which sometimes is accompanied by cramping and tingling of the toes of the left foot. Each of these conditions is aggravated by prolonged standing, bending and stooping. In addition, he holds his neck quite rigid and in a guarded position. He walks rigidly with his back in a hyperbolic position. Since he demonstrates rigidity and muscle spasm in the cervical and lumbar spine areas with a moderate limitation of motion throughout both the cervical and lumbar spines, Fairchild has been unable to perform signal work without

severe pain. He has difficulty raising his head. He cannot crane his neck. He cannot stand for any appreciable length of time. He has great pain when he uses his left hand and arm, especially when raised to near, at or above shoulder level.

For a period of time from June 1982 through January 1984, he did work as a signalman against the doctor's orders in order to obtain a sufficient number of hours of work in order to get certain benefits under the collective bargaining agreement. In order to do so, he took medication to ease the pain. This medication included Codeine, Motrin and Tylenol.

Fairchild first went on the Casualty Board on April 1, 1984, after achieving "A" Status.

Fairchild testified that he was granted a no signal work exemption by Dr. Wald by his reports of July 17, 1985 and october 24, 1986.

Fairchild testified that (next to the vessel) signal work requires standing "under the hook" to signal the crane operator. It involves looking up for long periods of time, constant standing, raising your arms over your head for much of the day giving signal to the crane operator so that he can see them and the extension of the neck in checking the cargo. Only a few of the signal jobs use a radio from a vehicle. These jobs generally are signalmen performing work on the "blind side" of a transtainer. These persons are not in direct view of the crane operator and do not give hand signals. Other signal work is in a container yard under a transtainer. (See photos 1 through 77)

Because of his physical impairment and the restrictions with respect to the cervical spine and lumbar spine, Fairchild has been unable to perform signal work since

he cannot hyper extend the neck, cannot stand for any prolonged period, and cannot raise his left arm and hand without pain.

The automatic elimination of the signal work exemption irrespective of an individual's physical impairment has had a serious adverse effect on the work opportunities available to Fairchild. Since he must now take a signal job, he has been unable to work in any position in the harbor since the policy of June 15, 1987. This is true, even though he is willing and able to perform certain duties of the marine clerks classification. However, he never receives an opportunity for that type of work, since he must first accept a signal job if one is available before the marine clerks work becomes available under the present operation of the Casualty Board system.

Ray Imbagliazzo was employed as a longshoreman. On February 9, 1982, he was injured when a 40 lb. box of bananas struck him on the neck and shoulders while he was unloading a banana boat. This injury required two spinal surgeries in 1983. As a result of the injures, he was not able to return to work until late January 1984. When he returned to work, he tried to do dock work, front work and signal work. He experienced great difficulty in attempting to perform these particular jobs and asked to be placed on the Casualty Board.

As a result of the injuries to his cervical spine and thoracic spine and right shoulder, he was restricted from performing any type of work which requires prolonged standing, elevation of the arms above shoulder level, or extension of the neck. He experiences constant pain throughout the cervical spine and thoracic spine. Further,

he experienced a 50% loss of motion in all planes of the cervical and thoracic spine and the right shoulder area.

As a result of their physical disabilities, Mr. Imbagliazzo was granted a "no front, no signal work" exemption and was assigned to marine clerk work under the Casualty Board procedures. This remained so until the policy and procedure change in the dispatch rules effective June 15, 1987. As a result Mr. Imbagliazzo cannot perform "signal work" because he cannot hyperextend the neck, cannot move his arms above the shoulder, and cannot stand for any prolonged length of time.

Mr. Rodriguez was first employed by PMA as a merchant seaman following service in the United States Army during World War II. He remained a seaman from 1947 until 1967 and worked part-time as a longshoreman.

In or about 1967, he became a full-time longshoreman. In 1971 he suffered knee injury and was placed on the Casualty Board. Subsequently, on July 21, 1975, Mr. Rodriguez sufferred a brain hemorrhage which placed further physical restrictions on him. As a result of these injuries, Dr. Wald imposed work restrictions upon him and provided in his medical report of February 3, 1986 that Mr. Rodriguez cannot accept work which requires sudden movement of his head or any type of looking up or looking down and, for those reasons, was limited to work as a checker (marine clerk work) on the Casualty Board. Mr. Rodriguez performed such clerk work off the Casualty Board for approximately 16 years prior to June 15, 1987.

The impact of the elimination of the "no signal work" exemption applied to Mr. Rodriguez notwithstanding his physical

impairments or physical disability. Mr. Rodriguez has not been able to perform signal work because he can't look up, can't bend down and can't stand very long.

Even though he possesses these work restrictions and physical impairments, he must suffer a "loss of work opportunity" when he checks in on the Casualty Board as a result of the change in the rules and procedures on June 15, 1987. In reality, he never receives an opportunity to perform marine clerk work because he turned down signal work. It should be noted that Mr. Rodriguez did not initially turn down signal work. He first tried to perform the work. He found, after trying it several times, that he could not perform these particular work duties, because it required him to look up and down.

Nelson Statom is a class A longshoreman who suffered an injury on the job. The

injury resulted in a torn rotator cuff of the right shoulder. He was seen by Dr. Wald, who placed certain restrictions upon him. These included a work restriction that he could not raise his right arm higher than shoulder level. Mr. Statom also testified that he cannot do much standing or walking as a result of his injuries.

Prior to June 15, 1987, Mr. Statom was able to perform marine clerk work on the Casualty Board since he possessed the "no front, no signal" exemption. After June 15, 1987, he no longer was permitted to claim that exemption from performance of signal work. He, like the other affected employees, has suffered a severe loss of work opportunities because he cannot physically perform the duties of signal work. Statom, like Rodriguez, attempted to perform this work at least on two separate

occasions. The last day he tried to perform such signal work was December 22, 1987. He found it very hard. He also had to take medication while he was performing the work as a signalman. It included Aspirin, Excedrin and Tylenol, but did not help much.

In 1987, Mr. Statom needed to work 14 hours to make a sufficient number of hours in order to qualify for certain welfare, vacation, medical and pension benefits under the collective bargaining agreement. He is not able physically to perform signal work. He remains ready, willing and able to return to work as a marine clerk in a position that he can perform.

On July 15, 1991, the Ninth Circuit Court of Appeals affirmed the Order of the District Court. (See Appendix A.) In particular, the Court concluded it had subject matter jurisdiction notwithstanding the fact that the primary asserted basis

the Stephans class for intervention was a claim under Section 503 of the Rehabilitation Act of 1973. The Court had previously concluded that it did not provide a private cause of action. Further, the Court ignored the Congressional mandate and its decision in Fisher v. City of Tucson, 663 F.2d 861 (9th Cir. 1981), cert. denied, 459 U.S. 881, 74 L.Ed.2d 146, 103 S.Ct. 178, and the decisions holding that primary jurisdiction of such claims is with the Department of Labor. As a result, persons, such as petitioners, are required to exhaust the administrative remedy with the Department of Labor, which is charged with the responsibility and has the administrative expertise to promulgate uniform rules, reasonably accommodating physically handicapped workers employed by federal contractors. Further, the effect of the Ninth Circuit's order affirming

the District Court decision is contrary to the requirement to make an attempt for reasonable accommodation of the individual's particular physical disability or impairment as determined by the disability guidelines established by the American Medical Association in accordance with the Department of Labor regulation set forth in 60 C.F.R. ¶ 741.7. The refusal to do so denies these petitioners due process and equal protection of the law under the Fifth and Fourteenth Amendments to the Constitution. A timely petition for rehearing was denied on October 24, 1991.

ARGUMENT

I

WHETHER THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE NINTH CIRCUIT, CONTRARY TO ITS OWN DECISIONS, UPHELD THE ORDER OF THE FEDERAL DISTRICT COURT EVEN THOUGH THE COURT DID NOT HAVE PRIMARY JURISDICTION TO ISSUE AN ORDER AFFECTING THE RIGHTS OF THE INJURED LONGSHOREMEN'S STEPHANS CLASS PLAINTIFFS IN THE CONSENT DECREE BECAUSE THE RIGHTS ASSERTED BY THE STEPHANS CLASS WERE UNDER SECTION 503 OF THE FEDERAL REHABILITATION ACT (29 U.S.C. § 793) AND AS A RESULT PETITIONERS HAVE BEEN DENIED DUE PROCESS AND EQUAL PROTECTION OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENT.

Federal Courts are Courts of limited jurisdiction. They do not have the broad jurisdiction of most state Courts. As a result, federal jurisdiction is always subject to question at any time before an appellate judgment becomes a finality.

The jurisdiction of a federal court can be raised at any stage of the proceedings. It can be raised even by the party

originally invoking the federal court's jurisdiction. Television Reception Corp. v. Dunbar, 426 F.2d 174 (6th Cir. 1970).

The first and fundamental question on every appeal is that of jurisdiction. If jurisdiction of the District Court is lacking, the power of the Court of Appeals is limited to correcting the error of the District Court and entertaining jurisdiction. Transport Mfg. & Equipment Co. of Delaware v. Trainer, 382 F.2d 793 (8th Cir. 1966). It is the duty of the appellate court to note the lack of the jurisdiction on its own motion. Philbrook v. Glodgett, 421 U.S. 707, 44 L.Ed.2d 525, 95 S.Ct. 1893. Federal jurisdiction cannot be assumed. It must be clearly shown. In a case under review, the Court of Appeals must satisfy itself not only of its own jurisdiction, but also that of the District Court. Chicago Stadium Corp. v. The State of Indiana, 220

F.2d 797.

The existence of Federal jurisdiction must appear from the record positively and it is not enough against objection that it may be inferred argumentatively. Therefore, the record must show that the controversy was not one of those cognizable by the Federal Court. Continental Life Insurance Co. v. Rhodes, 119 U.S. 237, 30 L.Ed. 380, 7 S.Ct. 193.

The four named petitioners herein are individual in pro per Plaintiffs and members of the Stephans Class. The Stephans Class was a group of intervening Plaintiffs that represent a class of persons who claim that the Defendants had violated their rights under the Federal Rehabilitation Act of 1973 (29 U.S.C. § 793). While the Court properly had jurisdiction of the claims of the Golden class and the Bowers class, it is respectfully submitted that

the District Court did not have jurisdiction to enter an order affecting the Stephans Class as a part of the Consent Decree because it involved a disposition of the rights of these injured workers who claim rights and benefits under the Federal Rehabilitation Act as a result of their status as injured longshoremen or workers with a physical handicap.

The District court considered this question in its Memorandum re Fairness of Settlement. The Court assessed the strength of the Stephans Class claims. The court specifically noted that the claims of the Stephans Class arise out of alleged unequal treatment for the handicapped longshoremen and the failure of the Defendants to make reasonable accommodations for the handicapped employees at the Port. The Court also specifically noted that the Stephans Class was foreclosed from asserting a

cause of action under the Federal Rehabilitation Act of 1973 by concluding that if the litigation continued, these claims would have to be dismissed. (Appendix E - p. 111) In particular, it appears that the Court was aware of the Ninth Circuit Court's decision in Fisher v. City of Tucson, 663 F.2d 861 (9th Cir. 1981) cert. denied, 459 U.S. 881, 74 L.Ed.2d 146, 103 S.Ct. 178.

Notwithstanding its awareness of the Ninth Circuit decision and the conclusion that the Stephans Class would be foreclosed from asserting a Cause of Action under the Federal Rehabilitation Act if the litigation continued, the Court nonetheless, indicated that the handicapped workers would be provided with a new casualty board and a system of certification for light work which would presumably safeguard against false claims having the effect of displacing the truly handicapped longshore worker.

They subsequently approved the proposed Consent Decree.

Fisher v. City of Tucson, supra, was an action brought by Fisher alleging that the City of Tucson violated § 503 of the Rehabilitation Act of 1973, by failing to hire him as an industrial electronics technician. Fisher, who suffered from a physical handicap, argued that the City of Tucson violated § 503 by discriminating against him on the basis of his handicap. He further contended that the City of Tucson failed to fulfill its contractual obligations under the Federal Rehabilitation Act to take affirmative action to employ such qualified handicapped individuals.

Section 503 of the Rehabilitation Act of 1973 mandates that any federal contract in excess of $2,500 contain a provision requiring that such contractors or subcontractors contracting with the United States

take affirmative action to employ and advance the employment of qualified handicapped individuals. Based upon the testimony of Mr. Ward that the U.S. Mail and military cargo receives priority, it is likely that the Defendants are subject to the Act.

If any handicapped individual believes that a contractor had failed or refuses to comply with the provisions of the contract regarding an affirmative action program to employ such qualified handicapped persons, the individual may file a complaint with the Department of Labor. The Department of Labor is charged with the responsibilities of promptly investigating such a complaint and to take such action as the facts and circumstances warrant.

This Court carefully considered whether or not Congress intended to provide a private action to enforce § 503. The Court concluded that Congress did not intend to

create a private right of action. Instead, the Court concluded that Congress meant to provide only for an administrative enforcement procedure under jurisdiction of the Department of Labor. See also: Myerson v. State of Arizona, 709 F.2d 1235 (9th Cir. 1983).

Based upon the foregoing authorities, it is respectfully submitted that a writ of certiorari should issue because the Court did not have primary jurisdiction to approve the provisions of the Consent Decree insofar as it affects the rights of the injured longshoremen, petitioners herein, because they had no right of a private action. Therefore, those provisions of the Consent Decree, insofar as they affect the rights of the injured longshoremen-petitioners herein, are null and void because the Court did not have primary jurisdiction of the claims they asserted as members of

the Stephans Class under the Rehabilitation Act of 1973 (29 U.S.C. § 793). As such, the petitioners have been denied due process and equal protection in violation of the Fifth and Fourteenth Amendments to the Constitution.

II

A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE NINTH CIRCUIT, CONTRARY TO ITS DECISION AND THE DECISIONS OF OTHER CIRCUITS, DID NOT REQUIRE THE INJURED LONGSHOREMEN TO EXHAUST THE ADMINISTRATIVE REMEDY WITH THE DEPARTMENT OF LABOR AS PRIMARY JURISDICTION WAS MANDATED TO IT BY CONGRESS UNDER THE FEDERAL REHABILITATION ACT, AND THE REFUSAL TO DO SO VIOLATES PETITIONERS' RIGHTS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The doctrine of primary jurisdiction provides that where the law vests the power to decide a controversy or treat an issue with an administrative agency, the Court will refrain from entertaining the case

until the agency has fulfilled its statutory obligation. Thus, by a Federal Court, as here, is presented with a case within its jurisdiction but which involves an issue within the confidence of an administrative body in an independent proceeding. The principles of comity and avoidance of conflict, as well as uniformity and consistency in the regulation, suggest propriety in referring the issue to that agency for decision in the first instance. California v. Federal Power Commission, 369 U.S. 482, A.2d, S.Ct. 901, 8 L.Ed.2d 54 (1962); Montana-Dakota Utilities Co. v. Northwestern, 341 U.S. 246, 254, 71 S.Ct. 692, 95 L.Ed. 912 (1951).

The doctrine is grounded in the very significant policy consideration that recognizes that the administrative agency may develop a great degree of expertise that first should be brought to bear upon

specialized problem before the judiciary intervenes. It also conserves substantial judicial resources. Further, the action is justified on the basis that it achieves uniformity and consistency in the regulations of those businesses and activities with which Congress is concerned.

The regulatory scheme of § 503 is a detailed administrative procedure promulgated for remedying alleged violations of Section 503 of the Federal Rehabilitation Act. Upon receipt of a complaint from an individual alleging that he as been aggrieved by a government contractor's failure to discharge its obligations, the Department of Labor must promptly investigate his allegations. If, after the investigation, the Department of Labor concludes that no violation has occurred, the complainant may request review of that decision by the Director. If the investigation reveals

that a violation of the Act or regulations has occurred, the Department of Labor must first attempt to secure the contractor's compliance through conciliation. If the resolution of the dispute cannot be accomplished through the informal process of conciliation, the Department of Labor, and not the complainant, is authorized to seek alternative remedies, including commencement of court action, institution of administrative hearings and proceedings, and the like.

The Ninth Circuit Court has continually held that Congress did not intend to create a private action to enforce §503, which provides for an administrative enforcement procedure under the Department of Labor. See Fisher v. City of Tucson, supra; Myerson v. State of Arizona, supra, 709 F.2d 1235 (9th Cir. 1983).

Nothwithstanding the existence of those authorities, the Ninth Circuit still upheld the lower Court's decision and permitted the Federal District Court to litigate those specific issues that Congress mandated be handled by exhausting the administrative procedure set up by the Department of Labor. For those reasons, the court order of July 15, 1991, and the provisions of the Consent Decree are null and void and a writ of certiorari should issue because the Court did not have jurisdiction of the claims they asserted as members of the Stephans Class.

III

WHETHER A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE NINTH CIRCUIT, RATHER THAN FOLLOW THE SPECIFIC ADMINISTRATIVE PRINCIPLES SET UP BY THE DEPARTMENT OF LABOR, PERMITTED THE DEFENDANTS TO UNILATERALLY REQUIRE THE INJURED LONGSHOREMAN TO ACCEPT PARTICULAR WORK WITHOUT CONSIDERING THE PHYSICAL IMPAIRMENT OF THE AFFECTED INDIVIDUAL EMPLOYEE AND WITHOUT MAKING ANY ATTEMPT FOR REASONABLE ACCOMMODATION FOR THAT INDIVIDUAL'S PHYSICAL DISABILITY OR IMPAIRMENT BY UTILIZING THE GUIDELINES OF THE AMERICAN MEDICAL ASSOCIATION.

The bulk of the testimony at the six days of trial during the evidentiary hearing dealt primarily with the performance of Signal Work and Marine Clerks work.

A number of injured workers testified with respect to the performance of signal and clerks work. In particular, the testimony from numerous witnesses, coupled with the 77 photographs and the video submitted to the Court, clearly establish that there are a variety of signal jobs. Similarly,

that same vidence clearly discloses that there are a number of marine clerk type jobs. No effort is made in the dispatch procedure to determine which type of signal jobs are less arduous than others. No attempt is made in the implementation of the Consent Decree to determine which marine clerk type jobs are more physically demanding or more arduous than others. Instead, a blanket conclusion is made that if an injured longshoreman can perform any kind of marine clerks work, he therefore, can perform any type of signal work.

It is respectfully submitted that this conclusion is invalid and is not supported by the evidence in the record as a whole. The undisputed evidence discloses that there are signal jobs which require constant standing with very few opportunities for a break or an opportunity to sit down. At the same time, there is evidence

that a signal man occasionally may be able to sit in a vehicle. However, the evidence does not establish that every signal man can sit in a jeep or jitney and still be in a position to signal the crane operator. The purpose of the signal man is to establish contact with the crane operator so that they can transfer a container or any other heavy object from a ship to a bottom cart, or from a stack of containers on the dock to a truck bed.

The most important factor for a signal man is to establish contact with the crane operator, so that the crane operator can receive directions and instructions from the signal man with respect to the load as it is being shifted from one place to another. It is established that the crane operator is anywhere approximately 90 to 130 feet higher from the ground from where the signalman is located. The signalman

makes use of hand signals. The signalman may use both hands. Some signalmen use only one hand. Some signalmen signal from waist level. Some signalmen signal from shoulder level; other signalmen signal from a height above the shoulder. The critical test is that the signalmen use the signals by hand from a position where the crane operator can clearly see the signal, so that the signal is not obstructed by anything. The 77 photographs clearly establish that the substantial majority of signals transmitted by the signalmen are at or above shoulder level.

The only instance when the signalman may not be in visible contact with the crane operator is when that signalman is performing duties from the blind side. This is the opposite side of the container and as a result he is out of view of the crane operator. Such signals are transmitted by

radio. The evidence clearly establishes no other instance when signal communication is made by radio.

Most of the witnesses testified that the signalman is standing when making signals to the crane operator. There is some evidence suggesting signalmen can sit in a jeep or jitney to signal the crane operator. The testimony and 77 photographs do not depict such to be the normal circumstance. Instead, particularly when the signalman is under the hook, he cannot and is not sitting in the vehicle. The evidence clearly establishes logically that a signalman is in a reclining or sitting position is extremely rare.

There is also evidence that the signalman must look up because the crane operator is approximately 90 to 130 feet above him. Individuals may look up in a different fashion than other individuals.

Some persons may raise his head by bending his neck; others may lean back so as to bend his back as well as tilt his head; others may merely shift his eyes to look upward. However, since we are speaking of approximately a 90 to 130 foot distance, it is respectfully submitted that it is reasonable for a signalman to either crane the neck or tilt the head and neck as well as look up or bend slightly in order to clearly see the crane operator so the load may be safely transmitted.

Similarly, there is evidence in the record to establish that a person may give hand signals at waist level, chest level, shoulder level, or above shoulder level. It appears that the method or means of signaling is essentially the choice of the individual. It should be kept in mind that the most critical requirement is that the signal given by the signalman be clearly

visible to the crane operator. As a result, a substantial majority of the signals given by signalmen is at or above shoulder level. Similarly, signals, for the most part, are given with both hands at the various heights.

It is interesting to note that the testimony of Dr. Wald with respect to the performance of signal work and the performance of marine clerk work. While Dr. Wald concluded that the physical demands of the two jobs may essentially be the same, he specifically qualified that conclusion to establish that he did not mean that the two jobs were the exact same job. In fact, he concluded that some signal jobs may be physically less demanding than some clerk jobs and vice versa. He likewise concluded some clerk jobs are physically less demanding than some signal jobs and vice versa.

Dr. Wald concluded that there were some signal jobs that injured longshoremen could perform, and at the same time, concluded that there were some signal jobs that an injured longshoreman could not perform. Similarly, he made a conclusion that there were some clerk work that the injured longshoreman could perform, and on the other hand, there was some clerk work that the injured longshoreman could not perform. Dr. Wald reiterated this conclusion when he stated that there was a spectrum whitin the clerks job classification that ranged from quite sedentary in nature to some clerks job that were rather active physically. He also indicated that the same spectrum with with respect to the range of quite sedentary to being physically demanding was true of signal work as well.

As a result of these conclusions, coupled with Dr. Wald's criteria of using the major parameters of endurance, strength, and flexibility, Dr. Wald concluded that the physical demands of the two are essentially the same. As a result, he concluded, generally speaking, that if an injured longshoreman could perform clerks work, he could perform signal work, but he did not delineate or elaborate upon the variety of clerk jobs and signal jobs with respect to particular disability or impairment of the individual handicapped employee.

It is respectfully submitted that this approach is expressly contrary to ¶¶ 45, 46 and 47 of the Consent Decree and is not consistent with the AMA guidelines. Paragraph 45 requires that all persons desiring to receive "checkin" rights to the Casualty Board be first examined by a physician chosen by the J.P.L.R.C., who

is Dr. Wald. The physician is then required to prepare a report before the Committee can approve of the "check-in" rights. Any person dissatisfied with the decision of the Committee is supposed to have grievance and arbitration rights. However, elimination of the "no signal work" exemption was not based upon the physician's report for an individual affected employee, i.e., the injured longshoreman - Stephans' Class petitioners herein. Since the decision to eliminate the "signal work" exemption, was made by the J.P.L.R.C., the employees had no grievance rights.

Further, ¶ 47 requires that the J.P.L.R.C. consider specifically whether the injured longshoreman would be unable to perform certain work dispatched from the Casualty Board. The Committee is required to determine that issue based upon the physician's report. Such is absent in

the instant case insofar as it is applied to the appellant's herein. Instead, there is a blanket determination that the injured longshoreman can perform signal work irrespective of his physical impairment based upon a medical report ofDr. Wald or any other doctor. The rule applies in blanket fashion and fails to take into consideration any reasonable accommodation for the individual's specific physical disability or physical impairment.

Paragraph 47 of the Consent Decree requires the Committee to make that determination based upon the physician's report, which is required to address the person's physical impairment.

It is only after that criteria is met that such a refusal of work should be considered a rejection of a work opportunity so that the injured longshoreperson turning down a work opportunity is penalized

and does not otherwise receive the benefits of the pay guarantee plan.

It is also noted that the provision of 41 C.F.R. 60-741.7 requires that the medical documentation of a physical impairment be made pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment. However, the criteria established by Dr. Wald is devoid of any reference to any AMA guidelines. In fact, Dr. Wald is not a member of the AMA and he does not utilize the guidelines thereunder in the preparation of his report.

It is the position of the appellants that a more reasonable accommodation with respect to their physical handicap would be to delineate which particular signal type jobs a person could perform as well as the particular type marine clerk work the individual could perform based upon his actual individual permanent impairment.

Thus, under this system, there would be no blanket inclusion or blanket exclusion of signal work. It would appear to be a more reasonable interpretation of the express language and the spirit and intent of the Consent Decree, as well as the reasonable accommodation requirements of the Rehabilitation Act of 1973 as required by 41 C.F.R. 60-741.4, 60-741.5, 60-471.6(d) and 60-741.7.

The failure to utilize this practice violates petitioners' rights of due process and equal protection of the law under the Fifth and Fourteenth Amendments to the Constitution.

IV

CONCLUSION

Petitioners respectfully request this Court to issue a writ of certiorari to the Ninth Circuit Court of Appeals, and review the issues raised herein.

DATED: January 22, 1992

Respectfully submitted,

CHARLES FAIRCHILD
RAY IMBAGLIAZZO
RAUL RODRIGUEZ
NELSON STATOM

Petitioners

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APPENDIX A

FILED

JUL 15 1991

Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEBORAH TAYLOR GOLDEN, et al, Plaintiff v. PACIFIC MARITIME ASSOCIATION, Defendant-Appellee, v. CHARLES FAIRCHILD; RAY IMBAGLIAZZO; RAUL RODRIGUEZ; NELSON STATOM, as agents of the Stephans Class, et al Plaintiff-Intervenors Appellants	) CA No. 89-55775) DC No. CV-80-4770-RMT))MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, Judge, Presiding

Argued and Submitted June 7, 1991
Pasadena, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

BEFORE: FLETCHER and CANBY, Circuit Judges, and REED,** District Judge

Four injured longshoreworkers appeal the district court's order denying their motion for an Order Re Contempt in the consent decree settling Golden v. Pacific Maritime Ass'n et al Civ. No. 80-4770-RMT (C.D.Cal.). We affirm.

BACKGROUND

Appellants are injured longshoreworkers employed at the Los Angeles-Long Beach Port, and are, therefore, members of the intervening Stephans subclass in Golden, who claimed discrimination in the hiring of injured longshoreworkers and clerks at the Port. The consent decree provided for the establishment of a Joint Port Labor Relations Committee ("JPLRC"), one of the duties of which was to implement the

** The Honorable Edward C. Reed, Jr., Chief Judge, United States District Court for the District of Nevada, sitting by designation.

consent decree's provisions for equitable assignment of injured longshoreworkers to light duty work. Paragraph 47 of the decree provides that "based on the physician's report, it shall specify types of work that the injured longshore person need not perform."

Pursuant to the consent decree, the JPLRC designated four types of jobs for which an injured longshoreworker may be determined to be eligible. The JPLRC later formulated the policy which is the subject of this appeal: "If a longshoreworker can perform clerks' work, he can perform signal work. . . . [and] a longshoreworker on the Casualty Board must accept front and signal jobs prior to accepting clerk jobs."

The impact of that rule was not felt for more than three years because the physician designated to determine the capability of injured longshoreworkers freely

dispensed "no front/no signal" exemptions from that policy. After that practice was called into question, the JPLRC "revitalized" its initial policy, ruling that, since clerk work and signal work were physically equivalent, there could no longer be individually-based exemptions from the policy that injured longshoreworkers could not be dispatched to clerk work if they had refused signal work.

Appellants here are injured longshoreworkers who had been granted "no front/no signal" exemptions, and, as a result of this "revitalization" were deprived of the option of turning down signal work to take clerk work. They moved the district court for an order holding the JPLRC in contempt of the consent decree, arguing that clerk work is different from signal work, that enforcing the disputed policy contradicts their earlier medical certification

exempting them from the policy, and that the policy was enforced in bad faith.

The district court held a six-day evidentiary hearing, and concluded that clerk and signal work were substantially similar, and that there was no evidence that the JPLRC had acted in bad faith. This appeal followed.

DISCUSSION

In the district court, appellants had the burden of establishing civil contempt by clear and convincing evidence. Vertex Distrib. Co. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 889 (9th Cir. 1982). We review the district court's factual findings for clear error. Kemmis v. McGoldrick, 767 F.2d 594, 597 (9th Cir. 1985). Although questions of interpretation of the consent decree are reviewed de novo, where, as here, the district court has been closely involved in overseeing its formation and

implementation, that de novo review is tempered by deference to the district court's interpretation. Vertex, 689 F.2d at 893.

1. Jurisdiction

The district court had subject matter jurisdiction to enter and enforce this consent decree in spite of the fact that section 503 of the Rehabilitation Act of 1973, the primary asserted basis of the Stephans class for intervention, does not provide a private cause of action. The Stephans class also asserted claims such as violation of 42 U.S.C. section 1985(3), third party beneficiary rights to a federal contract, and conspiracy to defraud the class of its rights under governing Collective Bargaining Agreements. These charges present federal questions providing subject matter jurisdiction in the district court to address these claims, or to enter and

enforce a consent decree settling them.

2. Need to seek court approval to alter consent decree

Parties to this consent decree are not required to submit any dispute regarding the interpretation of the decree to the district court for approval prior to the implementation of a disputed rule. Paragraphs 16 and 30 of the decree are not to the contrary. Paragraph 16 requires that disputes which cannot be resolved by the parties "shall be submitted to the court." It does not require that they be submitted to the court before a disputed policy is implemented. Such an interpretation would be far too cumbersome. Paragraph 16 provides the exact procedure which has occurred here. Appellants dispute a policy of the JPLRC, and they have submitted that dispute to the court for resolution.

Paragraph 30 permits defendants (in the underlying Golden action) to move to set aside the decree, in whole or in part, if attempting to meet its goals is unduly burdensome on them. This paragraph applies, by its terms, only to defendants, who are not complaining here. Further, it does not require pre-implementation court approval of disputed policies.

3. Individual assessment v. categorical policy

After extensive inquiry the district court found that, in spite of variation within the two categories, clerk and signal work are substantially equivalent in terms of physical demands on workers. That finding is not clearly erroneous, and we affirm it.

The consent decree does not require that injured longshoreworkers be assigned to individual jobs within the categories

of either signal or clerk work. Paragraph 47 of the consent decree uses expressly categorical language in providing that "the [JPLRC] . . . shall specify the types of work that the longshoreworker need not perform." (emphasis added). That categorical provision accommodates the practical difficulties that would be involved in requiring dispatch to individual jobs within a particular type of work, where "signal and clerk work often changes during a single shift . . . [and] each job type varies by employer and terminal." Findings of Fact and Conclusions of Law, 5/30/89, at 18, ¶ 46.

4. Bad faith

The district court found that there was no evidence that JPLRC had implemented its policy in bad faith. That finding is not clearly erroneous. Appellants offer no independent evidence of bad faith, other

than to repeat their legal and factual argument addressed above, asserting that they demonstrate bad faith as well as error. That is not enough to establish bad faith.

CONCLUSION

Appellants have clearly failed to establish by clear and convincing evidence that defendants are in contempt of the decree. The judgment of the district court denying the contempt motion of the Stephans appellants is

AFFIRMED.

APPENDIX B

FILED

OCT 24 1991

Cathy A. Catterson, Clerk
U.S. Court of Appeals

DEBORAH TAYLOR GOLDEN, et al.,

Plaintiff,

v.

PACIFIC MARITIME ASSOCIATION, et al.,

Defendant-Appellee,

v.

JACQUELINE HANNA; SANDRA JONES; KAREN SCHAFFER; SANDRA ROBINSON; JOYCELYN HAMPTON; MYRA SOMEERS; DOROTHY SYKES; ELIZABETH GRAVETT,

Plaintiff-Intervenors Appellants.

) CA No. 89-55775
) DC No. CV-80-4770-RMT
) ORDER

BEFORE: FLETCHER AND CANBY, CIRCUIT JUDGES AND REED,* DISTRICT JUDGE

The panel has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

* Honorable Edward C. Reed, Jr., Chief United States District Judge for the District of Nevada, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

ENTERED

MAY 31 1989

Clerk, U.S.Dist.Court
Central District of
California
By (init.) Deputy

FILED

MAY 30 1989

Clerk, U.S.Dist.Court
Central District of
California
By (init.) Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEBORAH TAYLOR GOLDEN, et al., Plaintiffs, vs. PACIFIC MARITIME ASSOCIATION, et al., Defendants.	No. CV 80-4770-RMT ORDER
ROY H. STEPHANS, et al., Plaintiffs in Intervention.	

The above-captioned matter came on for hearing before the undersigned following this court's issuance of an Order Re Contempt and Setting Evidentiary Hearing.

After receiving both testimony and documentary evidence and arguments of

counsel, the court orders that the Order Re Contempt be dismissed.

Dated: May 30, 1989

/s/
ROBERT M. TAKASUGI
United States District Judge

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..x. Mld copy Ptys
..x. Mld Notice Ptys
..C. JS-8

May 31 1989

APPENDIX D

local members who desired to transfer and who were capable of performing marine clerk work.

The dispute over registration resulted in arbitration and a decision by the coast arbitrator, Mr. Sam Kagel ("Kagel"). The Kagel decision provided instructions for the hiring of new marine clerks: ...

... members to protect their interests. Treatment under Rule 23(b)(1) and (2) is the only practical alternative to avoid a multiplicity of suits, provide common binding adjudications, and prevent inconsistent or varying adjudications between the parties.

C. STEPHANS CLASS

Plaintiffs-in-intervention Stephans et al. have challenged defendants' policies and practices concerning the handicapped in the assignment of work at the Port. The putative class consists of at least 100 injured longshore workers which would, in light of the Golden and Bower classes, make joinder impractical.

The individual plaintiffs-in-interventions have put forth an all-encompassing attack against defendants for unequal employment practices and breach of the duty of fair representation in providing reasonable accommondation to the injured longshore

workers. The industry-wide attack raises common questions of law and fact which are typical to the putative class, especially in light of the employment practices governed by the collective bargaining agreement. The situation of each injured longshore worker is identical as to the issues raised and the relief requested. Where a group of employees and unions operate pursuant to a uniform collective bargaining agreement, it is appropriate that a category of workers with common attributes be certified to proceed as a class in attacking the defendants' practices under that agreement.

The named Stephans plaintiffs have an interest in this suit substantially similar to that of the putative class. The individuals have suffered and will suffer the same wrongs as the putative class because of their status as injured longshore workers. Prosecution of this action has been undertaken

vigorously as evidenced by the heated debate during the Stephans' application for a preliminary injunction. There is ample evidence that the suit is noncollusive and that the individual interests of the plaintiffs-in-intervention are not antagonistic to the claims to be asserted on behalf of the class or the relief requested Moreover, counsel for the Stephans group has demonstrated the ability to competently represent the interests of the individual plaintiffs-in-intervention and the putative class. The court finds that the class is adequately represented.

The same principles which apply to the Golden class and the Bower class in maintaining the action pursuant to Rule 23(b)(1), and (2) are equally applicable to the Stephans class. Defendants allegedly have acted and/or refused to act on grounds allegedly applicable to the class, thereby making final injunctive and declaratory relief appropriate to

the class as a whole. The Stephans class is seeking the same limited number of jobs at the Port. If the class is not certified, absent class members face the possibility of being prejudiced in their pursuit of the same limited number of jobs. Adjudication of the individual claims would effectively dispose of the class' interest. Furthermore, if a multitude of individual suits were litigated, defendants could be faced with incompatible standards of conduct especially in light of the Golden and Bower claims for ...

... registered as "B" longshore workers, 31 were women, 78 were black and 180 were Hispanic. The figures presented to this court demonstrate that a commendable racial balance was achieved out of the registration process. The class claims of retaliation are also questionable in that the application deadline for registration was well before the instant suit was filed. Furthermore, there has not been a concrete showing of the number of casual workers who actually applied for "B" class registration as longshore workers. The fraud claims of the class appear to be lacking any foundation. There are difficulties in proving scienter and a reliance interest necessary to sustain a fraud claim. Similarly, the class will have difficulty in attempting to prove selective discrimination.

The proposed consent decree provides for the immediate registration of 38 members of the Bower class who have worked the most hours

in the Port as marine clerks in the past three years. In addition, the next 50 persons registered hereinafter will be members of the Bower class. Although the Bower class has not been afforded the entire relief which it requested, i.e., the registration of the whole class, the provisions in the consent decree appear more than adequate considering the finite number of jobs available and the relative strengths of the claims which the class asserts.

3. STRENGTHS OF THE STEPHANS CLASS CLAIMS

The Stephans class has alleged claims under section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793(1); violations of 42 U.S.C. § 1985(3); breach of the duty of fair representation; violations of California Government Code Section 12940; and, conspiracy to defraud them of their rights under the collective bargaining agreement. All of the above claims essentially arise out of alleged unequal treatment for the handicapped

longshoremen and the failure by the defendants to make reasonable accommodations for the handicapped at the Port.

In the first two causes of action, the Stephans class has asserted rights under the Rehabilitation Act of 1973. If meritorious on these claims, the Stephans group would appear to be entitled to the most complete relief attainable. However, the recent Ninth Circuit decision of Fisher v. City of Tucson, supra, has substantially altered the relief which the Stephans group seeks. In Fisher, the Ninth circuit held that there is no private cause of action under section 503 of the Rehabilitation Act of 1973. Thus, the Stephans class is foreclosed from asserting a cause of action under the act. If the litigation continued, these claims would have to be dismissed and the class would have to litigate its other theories which do not appear to afford them the same type of relief.

The Stephans class claim under 41 U.S.C. § 1985 raised novel issues and would be matters of first impression. The class complains that the defendants have conspired to deny the class their due process rights under the fifth and fourteenth amendments. In addition, the class claims the defendants have conspired to deny the class its civil rights under the Rehabilitation Act of 1973 and California Government Code Section 12940. The class has not articulated what due process rights have been violated. Notwithstanding the failure to address what due process rights have been violated, section 1985 does not afford due process protection. The class would have to advance its arguments under the rights protected by the Rehabilitation Act and California Government Code Section 12940. It is unclear whether the class could succeed in advancing what claims it has under the Rehabilitation Act as a "right" protected by section 1985.

Actions involving Title VII violations may not be brought under Section 1985 because of the possible erosion of the administrative requirements under Title VII and the inconsistent remedies provided by each statutory scheme. See Great American Sav. & Loan Assn. v. Novotny, 442 U.S. 366 (1979). In Fisher, the court was also concerned with the administrative procedure and the role of the Department of Labor when it declined to hold that a private cause of action under section 503 of the Rehabilitation Act exists. The right upon which the class appears to have a cause of action is under California Government Code Section 12940 which prohibits discrimination because of physical condition. A state-created civil right may be relied upon by an individual bringing action under section 1985. Life Insurance Co. of North American v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979). However, the class would still be faced with problems

of proof of conspiracy and proof of class-based invidiously discriminatory animus behind the conspirators' action. See Griffen v. Brekenridge, 403 U.S. 88, 102 (1971); DeSantis v. Pacific Tel. & Tel. Co., Inc., supra, 608 F.2d at 332-33. Moreover, in view of the practices at the Port and the somewhat preferential treatment given to the handicapped longshore workers in accordance with the collective bargaining agreement, the Stephans class claims under 1985 and California Government Code Section 12940 would raise uncertainties as to their likelihood of prevailing at trial. See discussion infra.

The class claims involving the breach of the duty of fair representation allege that L-13 and the ILWU have failed to fairly and honestly represent the interests of the class in failing to take action to protect the employment conditions of the handicapped longshore workers. The legal principles relevant

to the Bower class' fair representation claim are equally applicable to the Stephans class claim. The Stephans class will have to prove that the conduct of L-13 and the ILWU in negotiating the collective bargaining agreement and implementing the provisions thereof was arbitrary or undertaken in bad faith. In regard to the testing procedure for the 108 transferees, the Stephans class will be required to establish that the testing criteria was arbitrary or utilized in bad faith. The PCLCD provides some preferential treatment to longshore workers who are either old or disabled. Section 3.133 provides preferential assignment of "dock work to longshore workers who are old or disabled. Section 20.533 provides that men who refuse work opportunity will not be given available credit for the PGP except dock preference men who are exempt from work on ship (disabled longshore workers). Aside from the PCLCD, L-13 has provided

priority to the injured longshore worker for the "casualty board" and "swamper board" which consist of light work at the Port. In addition past practices have allowed injured longshore workers to apply for marine clerks' work when the registered marine clerk force has been depleted for any given day. Further, the injured longshore workers have been given the right to draw benefits from the PGP fund on an equal basis with nonhandicapped longshore workers.

The problems which brought the Stephans class into this suit involved the transfer of the 108 longshore workers into L-63. Before the Kagel decision, L-13 had advocated the transfer of longshore workers to L-63 with emphasis on seniority. After the Kagel decision a test was given to those desiring to transfer. Part of the criteria for the test gave injured longshore workers who had worked as a clerk 1/2 point for each month worked as a clerk (while injured) up to a maximus of

five points. At the time of the preliminary injunction, this court was concerned with whether that type of credit was sufficient affirmative action under the Rehabilitation Act of 1973 and not with whether or not the testing criteria was discriminatory, arbitrary or made in bad faith. Approximately 70 handicapped longshore workers applied for the transfer to L-63. Out of those applicants, approximately 20 handicapped longshore workers were selected for transfer. The extra credit which the handicapped longshore workers received appeared to enhance their chances of transfer and discount the other criteria of being able to perform <u>all</u> the tasks required of a marine clerk. The Stephans class' probability of succeeding on the merits in its unfair representation claim is highly speculative. It appears that without its claims under the Rehabilitation Act, the Stephans class' position in this lawsuit has diminished

substantially.

Under the proposed consent decree, this court is informed that 26 handicapped longshore workers will be among the transfers to L-63. The "casualty board" has apparently been revamped to include more jobs which are capable of being performed by handicapped longshore workers. If the consent decree is approved the "casualty board" cannot be bargained away by the parties in the collective bargaining process. [NOT LEGIBLE]
element of the conset decree is the establishment of an independent physician to examine employees for a determination as to whether employees are truly disabled so that those who are not truly disabled may not gain access to those jobs guaranteed to the most needy. This provision is important in light of the allegations that employees are being certified for handicapped longshore positions when they are truly not handicapped

individuals. Finally, if handicapped individuals refuse any job which they are unable to perform, they will not be denied PGP funds.

In view of the state of the law and the claims which the Stephans class advances, this court does not believe that the proposed settlement is unfair to this class. The class has to realistically evaluate its chance of success since the Fisher decision and the high financial costs involved if the class proceeded any further in this action on claims which appear highly speculative. A settlement by its very nature is a compromise which must be viewed in light of all competing interests.

E. PRESENCE OF COLLUSION

There is no evidence to support a claim of collusion between the parties. Each class of plaintiffs and the defendants have taken adverse positions since the inception of this suit. The only real agreement by the parties is the recognition that there is a need to

finalize the instant matter so that the flow of commerce may continue in an efficient manner at the Port. ...

... negotiations free from any collusion. The court congratulates counsel for their patience and ingenuity in drafting a settlement addressing the problems facing the workforce at the Port.

After a thorough review of the proposed consent decree and the objections thereto, this court is convinced that the settlement is fair, reasonable and adequate. There are a limited number of highly desirable jobs for which several groups are competing. Each group has a separate interest to pursue. As a practical matter, no one group can be completely satisfied. Throughout these proceedings, it appears that the class groups lose sight of the fact that their real adversary is the economy of this country which is experiencing a severe depression with widespread unemployment. This court is confident that when the economy improves, the working conditions at the Port will also improve.

DATED: MAY 20, 1983.

/s/
ROBERT M. TAKASUGI
United states District Judge

APPENDIX F

29 U.S.C. §793(a) provides:

Any Contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and non-personal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations

within ninety days after September 26, 1973.

29 U.S.C. §793(b) provides:

> If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

APPENDIX G

§ 60-741.4 Affirmative action clause.

Each agency and each contractor and subcontractor shall include the following affirmative action clause in each of its covered government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract.).

AFFIRMATIVE ACTION FOR HANDICAPPED WORKERS

(a) The contractor will not discrimiate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment

practices such as the following: Employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

(b) The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(c) In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(d) The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, provided by or through the contracting

officer. Such notices shall state the contractor's obligation under the law to take affirmative action to employ an advance in employment qualified handicapped employees and applicants for employment, and the rights of applicants and employees.

(e) the contractor will notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of section 503 of the Rehabilitation Act of 1973, and is committed to take affirmative action to employ and advance in employment physically and mentally handicapped individuals.

(f) The contractor will include the provisions of this clause in every subcontract or purchase order of $2,500 or more unless exempted by rules, regulations,

or orders of the Secretary issued pursuant to section 503 of the Act, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director of the Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for non-compliance.

APPENDIX H

§ 60-741.5 Applicability of the affirmative action program requirement.

(a) Within 120 days of the commencement of a contract every government contractor or subcontractor holding a contract of $50,000 or more and having 50 or more employees shall prepare and maintain an affirmative action program at each establishment which shall set forth the contractor's policies, practices and procedures in accordance with §60-741.6 of this part. This program may be integrated into or kept separate from other affirmative action programs of the contractor. Contractors presently holding government contracts shall update their affirmative action programs within 120 days of the effective date of this part.

(b) The affirmative action program shall be reviewed and updated annually. If there are any significant changes in

procedures, rights or benefits as a result of the annual updating, those changes shall be communicated to employees and applicants for employment.

(c)(1) The contractor shall invite all applicants and employees who believe themselves covered by the Act and who wish to benefit under the affirmative action program to identify themselves to the contractor. The invitation shall state that the information is voluntarily provided, that it will be kept confidential, that refusal to provide it will not subject the applicant or employee to any adverse treatment and that it will be used only in accordance with the Act and the regulations in this part. If an applicant or employee so identifies himself or herself the contractor should also seek the advice of the applicant or employee regarding proper placement and appropriate acommodation.

(An acceptable form for such an invitation is set forth in Appendix B of this part.)

(2) Nothing in this section shall preclude an employee from informing a contractor at any future time of his or her desire to benefit under the program.

(3) Nothing in this section shall relieve a contractor of its obligation to take affirmative action with respect to those applicants or employees of whose handicap the contractor has action knowledge: Provided, That the contractor is not obligated to search the medical files of any applicant or employee to determine the existence of a handicap.

(4) Nothing in this section shall relieve a contractor from liability for discrimination under the Act.

(d) The full affirmative action program shall be available for inspection to any employee or applicant for employment

upon request. The location and hours during which the program may be obtained shall be posted at each facility.

APPENDIX I

(d) Accomodation to physical and mental limitations of employees. A contractor must make a reasonable accomodation to the physical and mental limitations of an employee or applicant unless the contractor can demonstrate that such an accomodation would impose an undue hardship on the conduct of the contractor's business. In determining the extent of a contractor's accommodation obligations, the following factors among others may be considered: (1) Business necessity and (2) financial cost and expenses.

APPENDIX J

§ 60-741.7 Determination of handicap.

(a) Any handicapped individual filing a complaint with the Director under this part shall submit with his or her complaint a signed statement specifying the handicapping impairment or situation (see § 60-741.2 definition of "handicapped individual"). If the Director determines that further documentation is necessary, he or she may require the complainant to provide additional information.

(b) Any contractor requiring a determination of an applicant's or employee's handicap may require the applicant or employee to provide medical documentation of the impairment or, in the alternative, may require the applicant or employee to undergo a medical examination at the contractor's expense.

(c) Any determination of handicap required pursuant to paragraph (b) of this

section must meet the requirements of § 60-741.5(c) and must be for the purpose of affirmative action and proper job placement. Information obtained therefrom shall not be used to exclude or otherwise limit the employment opportunities of qualified handicapped individuals.

(d) All medical documentation required under this section shall be based upon the American Medical Association Guides to the Evaluation of Permanent Impairment, provided that the Guides shall be used only to determine the existence of impairment without regard to the degreee of impairment.

[43 FR 49276, Oct. 20, 1978; 43 FR 51402, Nov. 3, 1978]